

## SETTING THE BAR TOO HIGH

FRANK I. MICHELMAN<sup>†</sup>

In response to Youngjae Lee, *International Consensus as Persuasive Authority in the Eighth Amendment*, 156 U. PA. L. REV. 63 (2007).

“It’s only meant to be persuasive, not binding.” Thus runs, mantra-like, our blanket, disarming defense—against plausible objections—of judicial invocations of foreign law in U.S. constitutional cases. Professor Youngjae Lee’s manifest urge to burst this bubble feels entirely right to me.<sup>1</sup>

I further like the boldness of Professor Lee’s strategy. The data presented by Justice Kennedy’s opinion for the Court in *Roper v. Simmons* would seem to be special in purporting to show a literally unanimous, worldwide rejection of the juvenile death penalty outside of the United States.<sup>2</sup> If even such a total worldwide consensus could be shown to lack instructiveness when applying the Eighth Amendment’s Punishments Clause,<sup>3</sup> then surely—I take Professor Lee to be suggesting—no *divided*, brute nose-count of foreign law outcomes could be thought instructive, at least in the Punishments Clause context. Professor Lee thus sets for himself the task of establishing—against our predictable, strong intuitions—the negligible epistemic value, in this context, of even an external unanimity (let alone a mere majority) of outcomes. That task is daunting because, as I shall explain, data showing a *unanimous* worldwide rejection of the death penalty for juveniles seem especially resilient to challenges to instructiveness such as those marshaled by Professor Lee. (I deal here only with the central issue raised by Professor Lee’s article, that of the persuasive weight, if any, carried by an external consensus on punishment

---

<sup>†</sup> Robert Walmsley University Professor, Harvard University. Thanks to Adrian Vermeule for helpful comments.

<sup>1</sup> Youngjae Lee, *International Consensus as Persuasive Authority in the Eighth Amendment*, 156 U. PA. L. REV. 63 (2007).

<sup>2</sup> See 543 U.S. 551, 575-78 (2005) (surveying authorities and concluding that “the United States now stands alone in a world that has turned its face against the juvenile death penalty”).

<sup>3</sup> U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

calibration, in a *Roper*-like context of U.S. Punishments Clause adjudication.<sup>4</sup>)

So far as I am aware, virtually every country has laws regulating which punishments are available for which offenses and which offenders. Many rule out capital punishment altogether, but many do not. I know of no general reason to suspect that judges, lawmakers, and citizenries the world over approach the matter of punishment calibration with any less sane and sincere an eye to the merits as we would strive for. Nor do I see any general reason to doubt that deciders abroad, at least in a sizeable fraction of the world's countries, would roughly understand the merits to be composed of some mix of considerations resembling those that we would use, of culpability and desert, deterrence, and rehabilitative potential. (Note that this has little to do with the undoubted existence of intractable metaethical controversy among philosophical professionals—utilitarians, deontologists, and so on.<sup>5</sup> It is about what factors we think actually motivate the punishment calibration choices of practicing politicians and judges.)

We know, moreover, that many of these countries resemble us in additional ways that seem germane to the normative question at hand. They differentiate childhood from adulthood for sundry purposes of public policy and administration; they regard children as being less self-directing and responsible than adults; and they also believe that children are more salvageable because the young are less set in their ways. It is no doubt true that understandings in some countries vary markedly from ours in those very respects, along with others that might affect the normative choice. Yet, still speaking generally, other countries' differences from us do not seem to swamp their differences from each other, a point that makes their *unanimous* rejection of the juvenile death penalty all the more striking. I do not perceive—and Professor Lee does not specify—any particular, relevant, conditioning factor that makes us an all-purpose outlier relative to all or nearly all of the rest of the world.

Against that background, the fact that not a single other country in the world currently sees fit to expose juvenile offenders to capital punishment hits one between the eyes as a reality that—as I shall ar-

---

<sup>4</sup> See Lee, *supra* note 1, at 67 (“[T]his article focuses in particular on the significance of international consensus as persuasive authority in the Eighth Amendment.”).

<sup>5</sup> Cf. *id.* at 91, 104 (“[T]here is no agreed-upon methodology for resolving disagreements in the moral context.”).

gue—a conscientious Justice in *Roper* could not have ignored. If the Justice was leaning against a finding of Eighth Amendment violation, at the moment when he came upon the external-consensus information, then the receipt of it should have given him pause, at least to the point of pushing him to consider (a) what factors, specifically and concretely, might make the best answer different for his country than for any and every other country in existence, and/or (b) what reason *in general* (and not just with regard to some selected countries) he has for doubting the competence, focus, or sincerity of decision makers elsewhere. If, at the moment of reception, the judge was in exquisite equipoise on the Eighth Amendment question, then the consensus data should in all reason have figured for him as a deciding factor. If he was leaning towards a finding of violation, he could rightly have taken comfort from the data, allowing them to ease whatever residual qualms he might have had about his pending merits judgment.

So says *prima facie* intuition, and *prima facie* intuition here has technical, qualified backing from the well-known Condorcet Jury Theorem, as explained at length in a recent article by Professors Eric Posner and Cass Sunstein.<sup>6</sup> The account I am about to offer of the epistemic value of the consensus data in *Roper* amounts to a less formal, more intuitive rendition of their qualified jury-theoretic argument, with an added suggestion that worldwide unanimity tends strongly to sideline some of their qualifications.

We can start where Professor Lee does, with an *arguendo* assumption drawn from his prior studies of America's Eighth Amendment jurisprudence to date.<sup>7</sup> A due respect for this jurisprudence, Professor Lee claims, would commit our current Court to treating the question of a punishment's fitness as exclusively one of just deserts—of “proportionality” in a highly purist, or what I shall call a “strict,” sense of that term.<sup>8</sup> For Punishments Clause purposes, Professor Lee proposes, fitness is all and only a matter of the severity of the punishment as weighed against the gravity of the offense—of the punishment fitting the crime in that assiduously (one might almost say aggressively) nonconsequentialist sense.<sup>9</sup> Suppose we accept this framing of the question in *Roper*. How does that affect the instructiveness of a world-

---

<sup>6</sup> See Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 141 (2007) (explicating the mathematical logic behind the Jury Theorem).

<sup>7</sup> See Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 687-99 (2005) (arguing that the operative normative idea in Eighth Amendment jurisprudence has been proportionality).

<sup>8</sup> See Lee, *supra* note 1, at 78-80.

<sup>9</sup> See *id.*

wide rejection of death as a permissible punishment for juvenile offenders?

Professor Lee shows convincingly that the whole world could agree on strict proportionality as the test of punitive fitness, and yet countries could split apart in their yes-no conclusions regarding a given punishment for a given offense and still all be responding correctly. Given the wide variations of cultural, social, and institutional conditions among the world's peoples, we can be sure that locally authentic perceptions regarding the severity of death relative to other punishments will differ markedly; they might also differ over whether murder (say) is always or sometimes the gravest of offenses (as compared, say, with torturing), and also over how much, if at all, a perpetrator's youth diminishes the gravity of an offense.<sup>10</sup> In sum, as Professor Lee contends, since societies doubtless will differ widely in their genuine perceptions of the quantities in both pans of the scale in any given case or class of cases, there can be no striking of the balance that is right for everyone—from which it follows, Professor Lee thinks, that a cross-society nose-count on a question of the proportionality of a given punishment to a given class of offenses is void of epistemic value to any particular society.<sup>11</sup>

There surely is something to this line of thought. Suppose we find the world's countries divided on the use of prison sentences in excess of fifteen years for the offense of embezzling from an employer, with a clear majority never crossing the fifteen-year line. The kinds of considerations advanced by Professor Lee counsel strongly against any particular country's reliance on that brute nose-count as being informative for it on the question of the strict proportionality of a sentence in excess of fifteen years as punishment for embezzlement from an employer. But now suppose the dispute is over the strict proportionality of a forty-year sentence (throw away the key) for first-time convicted embezzlers, and we find that over the past quarter century—during which period convictions for such crimes have regularly occurred everywhere—no other country in the world has imposed a sentence in excess of ten years. Are *those* data epistemically valueless?

How many countries are there in the world where we would expect people, by and large, to see both the heinousness of embezzlement relative to other crimes and the severity gap between a ten-year and a forty-year jail term roughly as we would? Might the number of

---

<sup>10</sup> See *id.* at 80-87 (reviewing the differences).

<sup>11</sup> See *id.*

these relevantly like-minded countries approach or exceed, say, ten? On the standard jury-theoretic analysis, a bare majority (let alone a perfect consensus) of a group of ten judges—all of them applying the same standard, each of them being conceded a materially better-than-even chance of getting the judgment right—enjoys an imposing probability of having reached the right answer, the probability rising with the number of judges.<sup>12</sup> Of course, this assumes they are all addressing the same issue,<sup>13</sup> and the point is that in the group of relevantly like-minded countries we have in view here (whatever you think their number may be) they all would be.

Notice, now, how the question of the permissibility of the death penalty for juveniles fits the mold. Among inquirers who share a view of death as a unique, extraordinary, and maximally severe punishment, and who also think roughly alike about a pre-adult life-cycle phase of diminished responsibility, the yes-no question of whether death may *ever* be a fitting punishment for a juvenile perpetrator, no matter the crime, is one that has a right answer in principle. So the test for the epistemic value of a perfect consensus against ever permitting capital punishment for juveniles, in a worldwide sample that can be presumed to include *some* number of relevantly like-minded countries, again becomes what you think that number is: the more of them there are, the greater the epistemic value, but there is some such value even if there are only a very few of them.

Note that it does not matter that quite a few countries in the worldwide sample—this is Professor Lee’s point—are surely *not* relevantly like-minded with us. All that matters is whether, on consideration, you believe that some of them surely are. That is because the worldwide-consensus fact tells us that, whatever number of relevantly like-minded countries the sample contains, not a single one of *them* dissents from the flat rejection of death as a fitting punishment for juveniles. It so informs us, *pace* Professor Lee, however true it also is that any randomly selected country in the worldwide bunch “may” think vastly differently than we do about the severity of death, or about the necessity for it in order to induce a desired level of deterrence, or about the responsibility of juveniles.<sup>14</sup>

Of course it is, as Professor Lee says, “possible”—in the sense of conceivable—that we Americans take death-as-punishment less seriously than literally *everyone* else, or that we *alone* have the spine to give

---

<sup>12</sup> See Posner & Sunstein, *supra* note 6, at 141.

<sup>13</sup> See *id.* at 144 (discussing the “similarity” condition).

<sup>14</sup> See Lee, *supra* note 1, at 82-83.

juvenile offenders what they really and truly deserve.<sup>15</sup> Conceivability, however, is not the question. The question for the conscientious American decider is whether she honestly *believes* that we are thus unique (not to say peculiar), or rather believes something like the opposite: that the probability is strong that the number of the world's relevantly like-minded societies—societies from which we do not differ markedly in the pertinent respects—is large enough to sustain the instructiveness for us of the external world's unanimous rejection of the juvenile death penalty. Nor, again *pace* Professor Lee, does logic require that our deciders first identify the supposedly compatible countries and cross-examine them for their reasons, before such a belief on the deciders' part can be robust enough to warrant their attention to the consensus.<sup>16</sup> For that, a general conversance with life and society in a few other parts of the world, gained through education, books, the media, and perhaps some travel, will suffice. Professor Lee is setting the bar unnecessarily high.

But cannot Professor Lee cogently object that America (or at any rate our Punishments Clause) really may be unique in a different respect—that of treating the fitness-of-punishment question as one of strict desert or proportionality, excluding consequentialist considerations of deterrence and salvation?<sup>17</sup> He cannot, although the objection does force a slight recasting of my claim about the likely relevant comparability to us of at least a handful of other countries. Allowing that the American doctrine is as Professor Lee proposes, I remain on safe ground as long as we think that any given country's exceptionless rule against ever applying a given punishment to a given offense-category can normally be taken to reflect a belief in the categorical disproportionality of that punishment to that category on the part of that country's deciders, at least for countries otherwise falling within our group of the relevantly like-minded. Does anyone really doubt that that is what is going on in many of the countries in our data set? If not, then the flat refusal of *those* countries *ever* to permit death as a punishment for juveniles must be taken to convey their several judgments that death is never plausibly a proportionate punishment for a juvenile offense, which is exactly the question that Professor Lee says American deciders must confront.

---

<sup>15</sup> *See id.*

<sup>16</sup> *See id.* at 110 (“[I]t is possible that an overlapping consensus can indeed help us improve our moral deliberations, but only if we are able to peek behind the consensus and see what it is based on . . .”).

<sup>17</sup> *See id.* at 84-85.

All of that being so, the stark fact that absolutely all of the rest of the world rejects the juvenile death penalty is one that our merits-seeking Justice has solid reason to notice, and even to treat as decisive if he lacks his own conviction on the ultimate question of fitness that confronts him. That is not because (as in the aesthetic-judgment case that Professor Lee discusses<sup>18</sup>) the rest are presumed to be trained, inculcated, or expert in ways that he is not, but simply because they can be presumed to be, on average, his peers in these respects. He cannot reject their consensus on the jury-theoretic ground of their each having a less-than-even chance of getting the fitness judgment right without impeaching his own pretension to judging proportionality correctly.

Note, please, that I do not base my claim for the instructiveness of a worldwide consensus on any notion of a least-common-denominator, cancellation-of-differences sort of “wisdom of crowds.”<sup>19</sup> I speak only of the instructiveness of the unanimity of that subset of relevantly comparable countries (comprising something like Professor Lee’s “Dignity Society”<sup>20</sup>) that almost certainly lie ensconced within the worldwide crowd. If Justice Scalia should happen to be listening: Being unanimous, this is not a crowd out of which anyone needs to pick their friends; all you need to know is that your “friends”—the relevantly comparable countries—are out there somewhere, even if in merely modest numbers. Now, it certainly does not *hurt* my case to notice that also out there in that motley consensus are countries relevantly quite different from us.<sup>21</sup> But my argument does not rely at all on that observation.

Having said all that, I must now confess to some unease about Professor Lee’s stipulation of strict proportionality as the sovereign American guide to determining a punishment’s fitness. To my reading (admittedly untutored in the niceties of our punishment jurisprudence), the *Roper* opinion uses the term “proportionality” in some not-so-purist sense, treating desert as a dominant concern in American judgments of the fitness of punishments, but allowing that consequen-

---

<sup>18</sup> See *id.* at 94-95 (analogizing to the predicament of a novice film critic out of synch with established, expert opinion).

<sup>19</sup> See *id.* at 101-02 (describing the theory that the collective judgment of a group composed of members having crosscutting biases will be more reliable than the judgment of any selected member of the group).

<sup>20</sup> See *id.* at 99-100 (“[M]embers hold the values that I hold and . . . I have similar moral instincts as they do on various issues.”).

<sup>21</sup> See *id.* at 101-02 (allowing that a “culturally transcendent” consensus can sometimes carry “a special kind of force”).

tialist considerations of deterrence and salvation can also have a bearing.<sup>22</sup> (Accurately and unprotestingly, Professor Lee himself describes the *Roper* Court's "proportionality analysis" as including its considered judgment that *neither* "deterrence" *nor* "retribution" can justify the death penalty for juveniles.<sup>23</sup>) Perhaps we could say that proportionality provides the frame within which the more consequentialist-looking factors get to say their pieces in the American discourse of punishment.

I am not qualified to wrestle with Professor Lee over whether that might be the better reading, and I shall not. My intention at this point is merely defensive. I need to establish that *if* our notion of the proper American test for acceptability of a punishment does deviate from strict proportionality so as to admit considerations of deterrence and salvation, that fact will do no harm to my claim for the instructiveness, for us, of the worldwide unanimous rejection of the juvenile death penalty.

Of course, it must be taken as true, as Professor Lee insists, that the relative weights assigned to considerations of proportionality, deterrence, and salvation vary markedly among countries; and furthermore that a myriad of other historical-contextual, political, institutional, and cultural variables enter into any given society's intuitions of overall fitness; and still furthermore that there is no reason to assume that any other country's profile on this multidimensional, causal-influential space is an exact match to ours.<sup>24</sup> But neither is there any reason to assume the opposite: that vanishingly few of those other countries are a relevantly close match for us—that in dimension after dimension after dimension, we are sitting in Pluto-position relative to the means or the regression lines that any more-than-minuscule subgroup of the rest would comprise. So my argument remains on track. The presumption of epistemic value in the face of worldwide unanimity holds, and to refuse that fact entry into our own merits-seeking deliberations is unintelligent.

There is one further worry, one that Professor Lee treats as make-weight but that I regard as the most formidable objection to be raised against a U.S. decider's treating as instructive the sort of consensus

---

<sup>22</sup> See, e.g., *Roper v. Simmons*, 543 U.S. 551, 571-72 (2005) (suggesting that the answer to the constitutional question may be affected by evidence regarding the deterrent effect of the death penalty on juveniles).

<sup>23</sup> See Lee, *supra* note 1, at 75.

<sup>24</sup> See *id.* at 107 (listing special facts about the United States that may color our moral considerations of juvenile culpability).



that figures in *Roper*. We need to think about what may be motivating the choices of later-coming adherents to consensuses as we finally see them.<sup>25</sup> If our grounds become too strong (and the very fact of unanimity might be one) for suspecting that later-arriving participants have just gone along with the crowd, so that their “votes” do not reflect their several independent judgments, the jury-theoretic, epistemic value of the resulting consensus is drastically reduced.<sup>26</sup> A full assessment requires deeper investigation than I can supply here and now, leaving me simply to say that *this* is where any remaining battle over *Roper*-style use of foreign-law consensus information in Punishments Clause cases should be joined.

---

Preferred Citation: Frank I. Michelman, Response, *Setting the Bar Too High*, 156 U. PA. L. REV. PENNUMBRA 391 (2008), <http://www.pennumbra.com/responses/02-2008/Michelman.pdf>.

---

<sup>25</sup> See *id.* at 86, 103 (noting that countries may sign on to human rights treaties because they seek to gain international political capital, rather than because they feel that doing so is morally or legally correct).

<sup>26</sup> See Posner & Sunstein, *supra* note 6, at 144-45, 160-64 (explaining how the “*cascade effect*” diminishes the force of the jury-theoretic analysis).